

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. 02-20380 BV
)	
MICHAEL R. SMITH,)	
)	
Defendant.)	

ORDER ON DEFENDANT'S MOTIONS FOR DISCLOSURE OF GRAND JURY
COMMENCEMENT AND TERMINATION DATES, TRANSCRIPTS, AND BALLOT OR
CONCURRENCE FORM

Before the court are three motions filed December 17, 2003 by the defendant, Michael R. Smith, seeking pretrial discovery pursuant to Rule 6(e)(3)(E)(ii) of the Federal Rules of Criminal Procedure. The government timely responded on December 29, 2003. The motions were referred to the United States Magistrate Judge for determination. For the following reasons, the motion for disclosure of the dates upon which the grand jury commenced and terminated is granted. All other motions are denied.

BACKGROUND

Michael Smith was originally indicted on October 9, 2002. A superseding indictment was filed on June 24, 2003, indicting Smith on fifteen counts related to robberies in the Memphis, Tennessee area. Specifically, Smith was indicted in Counts 1 and 5 for possessing a firearm and ammunition after conviction of a crime punishable by imprisonment for a term exceeding one year in violation of 18 U.S.C. § 922(g). Counts 2, 6, 8, 10, 12, and 14

charge with Smith and two other defendants with aiding and abetting each other in robbing or attempting to rob Cash America, two pawn shops, and three armored cars in violation of 18 U.S.C. § 1951. Counts 3, 7, 9, 11, 13, and 15 charge Smith and two other defendants with using firearms in connection with those robberies in violation of U.S.C. § 924(c). Smith and two other defendants were also indicted in Count 4 for "knowingly" taking and carrying away firearms from the premises of a business licensed to engage in the dealing of firearms in violation of 18 U.S.C. § 922(u).

On October 29, 2003, Smith filed a motion seeking to terminate his court-appointed counsel and demanding that he be allowed to proceed *pro se*. His motion was granted on November 21, 2003 in a hearing before this court. Acting *pro se*, Smith filed the three motions presently before the court seeking the disclosure of grand jury materials in connection with his indictment. In his first motion, Smith seeks disclosure of the commencement date(s) and termination date(s) of the grand jury that indicted him. The second motion seeks the disclosure of the grand jury records and transcripts. Smith's third and final motion requests the disclosure of the ballot or concurrence form of the grand jury voting to indict him. Each motion will be discussed in detail below.

ANALYSIS

The general rule of secrecy of grand jury proceedings has been held to be essential to the purpose of the grand jury process. *United States v. Proctor and Gamble Co.*, 356 U.S. 677, 681 (1958). The exceptions to the general rule are few, as evidenced by Rule 6(e)(3) of the Federal Rules of Criminal Procedure. See FED. R. CRIM. P. 6(e)(3). The defendant argues that he has demonstrated

grounds for disclosure of the grand jury materials in the present case under Rule 6(e). Rule 6(e) provides in pertinent part:

The court may authorize disclosure - at a time, in a manner, and subject to any other conditions that it directs - of a grand-jury matter:

* * *

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; . . .

FED. R. CRIM. P. 6(e)(3)(E)(ii). It has long been the "settled rule" of the Sixth Circuit to require the defendant to demonstrate a "particularized need" for disclosure of matters occurring before the grand jury before the defendant may have pretrial access thereto. *United States v. Tennyson*, 88 F.R.D. 119, 121 (E.D. Tenn. 1980) (citations omitted); see also *Short*, 671 F.2d at 186. The defendant's particularized need for disclosure must outweigh the interest in continued grand jury secrecy. A "generalized desire" to inspect the grand jury transcripts in the hopes that evidence beneficial to the defendant will be discovered does not satisfy the particularized need requirement. *Tennyson*, 88 F.R.D. at 121. Furthermore, the disclosure of grand jury proceedings is "not proper merely for discovery purposes." *Id.* It is within the trial judge's discretion whether to grant or deny requests for the disclosure of grand jury proceedings. *United States v. Levinson*, 405 F.2d 971, 981 (6th Cir. 1968).

A determination of whether disclosure is proper requires the consideration of whether the defendant has demonstrated that a "ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." FED. R. CRIM. P.

6(e) (3) (E) (ii).¹ Smith asserts that he has four possible grounds upon which to support a motion to dismiss the indictment that would qualify as a particularized need for the disclosure of the grand jury commencement and determination dates, transcripts, and ballot or concurrence form. These grounds are discussed within the context of the information sought.

A. Disclosure of Grand Jury Commencement and Termination Dates

In his first motion to compel, Smith contends that he is entitled to disclosure of the grand jury's date of commencement and termination because otherwise, he will not know whether the government complied with Rule 6(g) of the Federal Rules of Civil Procedure. (Def.'s Mem. of Law in Supp. of Mot. for Disclosure of Commencement and Termination Dates of Def.'s Indicting Grand Jury at 2.) Rule 6(g) provides:

A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

FED. R. CRIM. P. 6(g). A defendant's remedy for a violation of Rule 6(g) is the dismissal of the indictment as void. See FED. R. CRIM. P. 6(b) (2); 1 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 112 (3d ed. 1999). Not all non-substantive matters concerning grand jury proceeding must be kept secret. See *In re Grand Jury Investigation (DiLoreto)*, 903 F.2d 180, 182 (3d Cir.

¹ Smith's pending motion to dismiss all or part of the indictment is not presently before this court; however, none of the grounds advanced in the pending motion to dismiss are dependent on the grand jury information sought by Smith.

1990). Courts in other circuits have held ordinarily that the "disclosure of the commencement and termination dates of the grand jury does not disclose the essence of what took place in the grand jury room." *Id.*; see also *In re Cudahy*, 294 F.3d 947, 951 (7th Cir. 2002) ("[T]he mere fact of the existence of a grand jury is [not] automatically to be deemed a matter occurring before it . . . unless revelation of its existence would disclose the identities of the targets or subjects of the grand jury's investigation"); *In re Special Grand Jury*, 674 F.2d 778, 781 (9th Cir. 1982); *cf. United States v. Enigwe*, 17 F. Supp. 2d 390, 393 (E.D. Pa. 1998) (finding disclosure of commencement and termination dates improper where "there are ample 'specific reasons' militating against disclosure.").

Although the government has opposed Smith's motion, it has not set forth any specific reasons as to why the commencement and termination dates should be kept secret. In the instant case, this court sees no apparent reason to bar disclosure of the grand jury's commencement and termination dates. Accordingly, the defendant's motion is granted as to that material.

B. Disclosure of Grand Jury Transcripts

In his second motion, Smith argues that he should be entitled to the disclosure of the grand jury transcripts in returning his indictment for two reasons. First, he argues that he has grounds for a motion to dismiss the indictment because the prosecutor for the government failed to explain to the members of the grand jury the "interstate commerce nexus of 18 U.S.C. § 1951" and "the difference between coercion and extortion as those words apply to

the Hobbs Act." (Def.'s Mem. of Law in Supp. of Mot. to Disclose Grand Jury Tr. at 3-4.)

In addition to the rule of grand jury secrecy, there is a general rule that an indictment "will not be the subject of independent scrutiny and is given a presumption of regularity." *United States v. Hart*, 513 F. Supp. 657, 658 (E.D. Pa. 1981); see also *United States v. Azad*, 809 F.2d 291, 295 (6th Cir. 1986) ("A presumption of regularity attaches to grand jury proceedings"). That rule is "just as applicable to a challenge of inadequate instructions as inadequate evidence," and the "mere speculation of irregularity is not enough to entitle the defendant to disclosure of grand jury material." *Hart*, 513 F. Supp. at 658 (citing *United States v. Budzanoski*, 513 F. Supp. 657, 658 (3d Cir. 1972)). Furthermore, as a general matter, there can be no grounds warranting the dismissal of an indictment for errors in grand jury proceedings "unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

Here, Smith has only speculated based on "a cursory reading of the indictment" that the prosecution failed to explain the difference between "coercion and extortion" and the interstate commerce nexus. (Def.'s Mem. of Law in Supp. of Mot. to Disclose Grand Jury Tr. at 4.) He has not demonstrated how he has been prejudiced by the prosecution's failure to explain even if such speculation is true. Accordingly, the defendant's motion is denied as to this ground.

Second, Smith contends that his Fifth Amendments rights were violated because the grand jury had "little or no input into the

decision to issue" his indictment. (Def.'s Mem. of Law in Supp. of Mot. to Disclose Grand Jury Tr. at 4.) In support of his belief, he points to the fact that the copy of the indictment he received was not signed by anyone, which he asserts is an indication that it was prepared completely by the prosecutor in retaliation for Smith's refusal to plead guilty to two counts in the superseded indictment and "rubber stamped" by the grand jury. (*Id.*)

Again, the general rule that an indictment is given a presumption of regularity requires that Smith demonstrate to the court more than mere speculation that the grand jury had little input in the decision to issue the indictment. Additionally, "[a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits" and "[t]he Fifth Amendment requires nothing more." *United States v. Powell*, 823 F.2d 996, 1000 (6th Cir. 1987) (quoting *Costello v. United States*, 350 U.S. 359, 362-63 (1956)).

After a careful review of the record and indictment at issue, the court finds no indication that the indictment was not rendered by the grand jury after deliberation. The fact that the defendant allegedly was handed an unsigned indictment at some point after the grand jury proceedings has no bearing on the fact that the record contains a properly entered true bill reflecting both the grand jury foreman's signature and that of the prosecutor. Therefore, Smith's motion as to this ground is denied because he has failed to produce more than mere speculation as a ground for dismissal of the indictment and has demonstrated no particularized need for the

grand jury transcripts.

In connection with his second motion, Smith requested, in the alternative to a finding of grounds for a motion to dismiss, that the court disclose the author of the order denying his motion and time spent in researching and writing the order. (*Id.* at 5.) Finding no law to support such a motion, the court denies his request.

C. Disclosure of Grand Jury Ballot or Concurrence Form

In Smith's final motion, he seeks the disclosure of the ballot or concurrence form of the grand jury voting to indict him. As grounds for disclosure and dismissal, he claims that he has a particularized need for the ballot because he is unable to determine whether twelve or more legally qualified grand jurors voted to return his indictment. (Def.'s Mem. of Law in Supp. of Mot. to Disclose Grand Jury Ballot or Concurrence Form at 2.) He asserts that Rule 6(b)(1) of the Federal Rules of Criminal Procedure provides him with the right to "challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected" and to "challenge an individual juror on the ground that the juror is not legally qualified ." (*Id.*) See FED. R. CRIM. P. 6(b)(1). Rule 6(b)(2) also provides that "[a] party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification" FED. R. CRIM. P. 6(b)(2).

The court finds that Smith's argument is without merit. Here, Smith wants to inspect the grand jury ballot or concurrence form. Defendants are "not normally entitled to the names of the members

of the grand juries that indicted them." *DiLoreto*, 903 F.2d at 182 (citing *United States v. McLernon*, 746 F.2d 1098, 1122-23 (6th Cir. 1984)); see *United States v. Hansel*, 70 F.3d 6, 8 (2d Cir. 1995); *In re Special Grand Jury*, 674 F.2d at 781 (finding votes of jurors on substantive questions subject to secrecy); *United States v. Barnes*, 313 F.2d 325, 326 (6th Cir. 1963); *Enigwe*, 17 F. Supp. at 393 ("record revealing the number of grand jurors concurring to indict should remain secret absent a particularized, discrete showing of need"). Conclusory statements made in support of a motion to dismiss the indictment and a motion to inspect the grand jury minutes are not enough to establish a particularized need. *Levinson*, 405 F.2d at 981. The policy behind the secrecy of jurors names is to protect those called for grand jury service from the intimidation or retaliation of indicted defendants. *Diloreto*, 903 F.2d at 182. In the present case, Smith has made no showing that any of the grand jurors might not have been legally qualified and has therefore not demonstrated a particularized need that would warrant disclosure of the grand jury ballot or concurrence form. See *United States v. Greater Syracuse Board of Realtors, Inc.*, 449 F. Supp. 887, 900 (N.D.N.Y 1978); *United States v. Barone*, 311 F. Supp. 496, 500-01 (W.D. Pa. 1970). Accordingly, the defendant's motion for the disclosure of the grand jury ballot or concurrence form is denied.

CONCLUSION

Based upon the foregoing, the defendant's motion for the disclosure of the grand jury's commencement and termination dates is granted. In the absence of a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, all remaining motions are denied and the proceedings of the grand jury in this case, including the grand

jury transcript and concurrence form, shall be kept secret as required by Rule 6(e).

IT IS SO ORDERED this 26th day of January, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE